BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

ANTHONY W. TATE	)	
Claimant	)	
V.	)	
	)	Docket No. 1,072,816
ADECCO EMPLOYMENT SERVICES	)	
Respondent	)	
AND	)	
	)	
INSURANCE COMPANY OF STATE	)	
OF PENNSYLVANIA	)	
Insurance Carrier	)	

ORDER

Claimant requests review of the April 22, 2015, preliminary hearing Order entered by Administrative Law Judge (ALJ) Ali N. Marchant.

APPEARANCES

Joseph Seiwert, of Wichita, Kansas, appeared for the claimant. John Emerson, of Kansas City, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has adopted the same stipulations and considered the same record as did the ALJ, consisting of the transcript of Preliminary Hearing from April 21, 2015, with exhibits attached and the documents of record filed with the Division.

ISSUES

The ALJ found claimant failed to provide timely notice that he sustained a work-related injury as required by K.S.A. 44-520, and denied claimant's request for benefits.

Claimant appeals arguing the evidence supports a finding he suffered injury by repetitive trauma and as such his date of injury is his last day worked. Therefore, claimant contends he provided notice of injury with the report of injury he completed for respondent on February 3, 2015, and is timely. Claimant notes the ALJ did not address his contention that he suffered injury by repetitive trauma.

Respondent contends that even though there was knowledge of the incident on January 13, 2015, respondent had no knowledge of claimant's injury until February 3, 2015, and since claimant has failed to prove the injury was the result of repetitive trauma, notice was not timely. Respondent contends the ALJ's Order denying claimant benefits should be affirmed.

The issue on appeal is whether claimant provided timely notice of his work-related injury to respondent.

FINDINGS OF FACT

Claimant started working for respondent, Adecco, a temporary employment agency, in December 2012 and was periodically put on assignments. On October 30, 2014, claimant was assigned to work at CTDI where he was tasked with loading and unloading trucks. Claimant testified he would lift anywhere from 1 to 60 pounds. He also operated a forklift.

On January 13, 2015, claimant had an incident while operating a forklift. Claimant was loading a truck when, as he was moving in reverse, he accidently raised the forks on the forklift causing the lift to impact the doorway. This caused the forklift to jerk and come to an abrupt stop. At the time of the incident, claimant did not notice any injury. He testified he was more shocked than anything after the incident. Claimant was taken off work after the incident so that an investigation could be conducted. Claimant testified it wasn't until he returned to work four or five days later that he started noticing pain while performing his job duties. Claimant continued to work at CTDI until February 2, 2015, and his condition continued to worsen. He testified that every time he would roll off or down a ramp on the forklift he would feel pain in his back.

Claimant's employment was terminated on February 2, 2015. Respondent's counsel indicated claimant is still technically an employee of Adecco, but that his assignment with CTDI simply ended. Claimant testified he passed the drug test he took after the accident in January and when he first starting working for respondent. However, he was asked to take another drug test after he came to the office to report harassment by a co-worker. Claimant testified he did nothing wrong to require being tested. After refusing to take this test, he was told to give Mamye Moore, respondent's CTDI supervisor, his badge and was escorted off CTDI property.

On February 2, 2015, claimant sought treatment at a health care center for hemorrhoidal bleeding. Claimant was feeling some back pain, but did not report it because his focus was on the bleeding. Claimant testified that at this time he was not able to bend over or walk for a long time. He could not cook, could not clean his house or go back to work.

Claimant first reported an injury to respondent on February 3, 2015. Since claimant has not been working, his symptoms have gotten better, but standing for a long time and trying to lift still cause him pain. Claimant denies any back problems before January 13, 2015.

Mamye Moore was assigned to work solely with CTDI. Ms. Moore has worked for respondent since December 1, 2014. Ms. Moore indicated claimant is still an employee of respondent. She also indicated she was aware claimant had an incident with a forklift on January 13, 2015. She spoke with claimant about the incident and offered medical treatment if needed, which claimant declined. Ms. Moore indicated that after the incident, per company policy, claimant was sent for a drug test and was suspended pending the results. Claimant was allowed to return to work on January 19, 2015. The information packet utilized when an injury is reported was given to claimant and was completed on February 3, 2015. At no time before that did claimant report being injured or that he was in need of medical treatment.

On February 4, 2015, claimant met with Benjamin Norman, M.D., and was diagnosed with lumbar strain and internal hemorrhoids. Dr. Norman informed claimant that the hemorrhoids were not a work-related problem and encouraged him to see a specialist. The only date of injury reported by claimant was on January 13, 2015. Dr. Norman attributed the lumbar strain to the January 13, 2015, work incident and prescribed medication and recommended restrictions.

On February 12, 2015, claimant met with Jody Morrison, APRN, for followup with Dr. Norman. Claimant had just been released from the hospital and continued to have low back pain, buttocks pain and pain along the mid back and in the thoracic region. Claimant had been in the hospital for bleeding hemorrhoids. Claimant was diagnosed with thoracic and lumbar strain, and scoliosis of the lumbar spine. Claimant was prescribed a muscle relaxer and an anti-inflammatory. He was also sent for physical therapy.

The medical records from Via Christi Occupational Medical, dated February 4, 2015, indicate an injury date of January 13, 2015. The medical records attached to the preliminary hearing transcript uniformly indicate an injury date of January 13, 2015. There are no medical reports indicating claimant suffered a series of trauma while working for respondent.

Claimant met with David Hufford, M.D., for a court ordered IME on April 7, 2015. Dr. Hufford found claimant's general health to be good, despite chronic issues and low back pain. Dr. Hufford found claimant to have a work-related low back injury with ongoing pain. He felt claimant's back injury was from the work incident of January 13, 2015, and appeared to be a direct tissue trauma involving the low back. An MRI of the lumbar spine and a series of lumbar epidural corticosteroid injections were recommended. Dr. Hufford found no relationship between claimant's reported rectal bleeding and the January 13, 2015, injury or any chronic and repetitive work activities.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2013 Supp. 44-501b(b)(c) states:

(b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.
(c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2013 Supp. 44-520 states:

(a)(1) Proceedings for compensation under the workers compensation act shall not be maintainable unless notice of injury by accident or repetitive trauma is given to the employer by the earliest of the following dates:
(A) 20 calendar days from the date of accident or the date of injury by repetitive trauma;
(B) if the employee is working for the employer against whom benefits are being sought and such employee seeks medical treatment for any injury by accident or repetitive trauma, 20 calendar days from the date such medical treatment is sought; or
(C) if the employee no longer works for the employer against whom benefits are being sought, 10 calendar days after the employee's last day of actual work for the employer.
Notice may be given orally or in writing.
(2) Where notice is provided orally, if the employer has designated an individual or department to whom notice must be given and such designation has been communicated in writing to the employee, notice to any other individual or department shall be insufficient under this section. If the employer has not designated an individual or department to whom notice must be given, notice must be provided to a supervisor or manager.
(3) Where notice is provided in writing, notice must be sent to a supervisor or manager at the employee's principal location of employment. The burden shall be on the employee to prove that such notice was actually received by the employer.
(4) The notice, whether provided orally or in writing, shall include the time, date, place, person injured and particulars of such injury. It must be apparent from the content of the notice that the employee is claiming benefits under the workers compensation act or has suffered a work-related injury.
(b) The notice required by subsection (a) shall be waived if the employee proves that: (1) The employer or the employer's duly authorized agent had actual knowledge of the injury; (2) the employer or the employer's duly authorized agent was unavailable to receive such notice within the applicable period as provided in

> paragraph (1) of subsection (a); or (3) the employee was physically unable to give such notice.
> (c) For the purposes of calculating the notice period proscribed in subsection (a), weekends shall be included.

It is not disputed that claimant suffered a work-related accident on January 13, 2015, when the forks of the forklift hit the doorway. The dispute centers around whether any injury resulted from that incident, and whether claimant timely notified respondent of the injury or injuries in question.

Ms. Moore acknowledged knowing about the incident with the forklift. However, when she inquired of claimant about any need for medical treatment claimant declined. Claimant failed to seek any medical treatment for his low back complaints until after his removal from CTDI when he refused to take the followup drug test. Additionally, when claimant first sought medical treatment on February 2, 2015, he was concerned about the rectal bleeding far more than the low back complaints.

Claimant acknowledges the first notice of a claimed injury from the January 13, 2015, incident occurred on February 3, 2015, the 21st day after the accident. By statute claimant had 20 days to provide notice to respondent of the injury and claimant failed to do so.

Claimant alleges injury by repetitive trauma which would allow the notice to be provided at a much later date and would make the February 3, 2015, notice timely. However, the medical evidence in this record fails to support claimant's allegations of a repetitive trauma. The reports display a date of accident on January 13, 2015 only. Additionally, the report of Dr. Hufford indicates a traumatic accident on January 13, 2015, but no series of trauma. While it is true claimant testified to ongoing pain while he worked through February 2, 2015, his testimony does not outweigh the medical evidence in this record. Claimant has failed to prove that he suffered a series of trauma from and after January 13, 2015. Therefore, the notice on February 3, 2015, remains untimely. The denial of benefits by the ALJ is affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[1] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2013 Supp. 44-551(l)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

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[1] K.S.A. 2013 Supp. 44-534a.

CONCLUSIONS

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed. Claimant failed to provide timely notice to respondent of the alleged injuries on January 13, 2015. Claimant also failed to prove that he suffered a series of trauma sufficient to extend the time allowed for notice to respondent.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Ali N. Marchant dated April 22, 2015, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of June, 2015.

_____
HONORABLE GARY M. KORTE
BOARD MEMBER

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Ali N. Marchant, Administrative Law Judge